

Religious objections to compulsory vaccination: the ECtHR approach

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«With vaccines constituting the most crucial and critical part of today's quality health care, an intrinsic obligation is carried by the States to show the utmost respect for the fundamental rights of the people and the minorities, as enshrined in the Convention of Human Rights».

Introduction

Vaccines are one of the greatest achievements in the history of public health, having been credited for saving millions of lives across the globe.¹ The World Health Organisation has long spoken out on the behalf of the safety of vaccines, leaving no room for doubt as to their vastly positive effect.² Yet, a new-found wave of anti-vaccination movements has been on the rise in recent years under the guise of religious objections. Questions have arisen as to whether mind should be paid to such claims and, predominantly, as to the circumstances under which religious freedom and the right to parental control can and ought to be restricted when they pose a threat to the protection of health. With vaccines constituting the most crucial and critical part of today's quality health care, an intrinsic obligation is carried by the States to show the utmost respect for the fundamental rights of the people and the minorities, as enshrined in the Convention of Human Rights. Therefore, the European Court of Human Rights is expected to properly balance the conflicting interests, as it always does, when delivering its judgement on suchlike 'sensitive' cases.

Although it is in the interest of society that all

citizens are vaccinated, there are some minorities that, as it will be proved below, should be given the right to refuse vaccination. That particular group of individuals should not be ignored; instead their human rights should be protected.

Comparative law about vaccination policy Europe

According to the 2010 survey of the Vaccine European New Integrated Collaboration Effort (VENICE) on the ways of implementing national vaccination programs (whether recommended or mandatory) fifteen (15) EU countries have made vaccination mandatory, while the remaining 14 have at least one mandatory vaccination included in their program.³ What is more, the results have shown that many vaccination programmes in Europe are successful despite being voluntary. The success of such a voluntary program, as the survey indicates, could be enhanced by a legal provision, which would stipulate that children who are not vaccinated should not go to school during outbreaks of the disease.

¹ NCBI, Vaccines for the 21st century, EMBO Mol Med. 2014 June. available at <https://www.unicef.org/immunization/>

² WHO, Questions and answers on immunization and vaccine safety, March 2017, available at <http://www.who.int/features/qa/84/en/>

³ Mandatory and recommended vaccination in the EU, Iceland and Norway: results of the VENICE 2010 survey on the ways of implementing national vaccination programmes, Eurosurveillance, 31/ May/2012, available at <http://www.eurosurveillance.org/content/10.2807/ese.17.22.20183-en>

United States and Canada

Religious exemptions from vaccination programmes are a common practice in the United States of America, since all states, with the exception of California, Mississippi and West Virginia, grant exemptions to vaccination to those whose religious forbid immunisation.⁴ Similarly, Canada, and specifically Ontario, recognises non-medical exemptions to all recommended vaccines.⁵ In addition, the law of many USA states, such as Arkansas, Georgia and Wyoming, provides that unvaccinated children should be sent home from school during an outbreak of disease for which they have declined vaccination.⁶ It must be stressed that such a model has proved efficient, since the number of hospitalisations and deaths associated with vaccine-preventable diseases in the country has substantially declined.⁷

According to the United States District Court, religious objections to vaccination can be raised successfully only when the defendants' purported beliefs are "religious" as well as "genuinely" and "sincerely" held.⁸ Thus, an exemption is granted only to individuals whose constitutional right to exercise

their religious belief, as recognised under the First Amendment, would be violated by mandatory vaccination.

Compulsory vaccination interferes with human rights

Interference with the right to physical integrity, personal development and self-determination of Article 8 of ECHR

The physical integrity of a person falls under the scope of "private life", a broad term not susceptible to an exhaustive definition, protected by Art. 8 of the European Convention of Human Rights (ECHR).⁹ The Strasbourg Court has emphasised that a person's bodily integrity is one of the most intimate aspects of their private life, and thus, that compulsory medical intervention, even if it is of a minor importance, constitutes an interference with this right.¹⁰ Therefore, compulsory vaccination, as an involuntary medical treatment, could be considered such a violation.¹¹

The Court has, further, held that "private life" encompasses, inter alia, the right to personal autonomy and personal development,¹² hence, the right to make decisions about one's body,¹³ and that the freedom to accept or refuse specific medical treatment, or to select an alternative form of treatment is vital to the principles of self-determination and personal autonomy.¹⁴ Therefore, a person can refuse an intervention with their body in light of their right to personal autonomy and self-determination, even if this intervention is considered to be in the best interest of their health.

Additionally, the ECtHR has reaffirmed Article

⁴ National Conference of State Legislatures, States with religious and philosophical exemptions from school immunization requirements, 12/20/2017, available at <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx>

⁵ National Center for Biotechnology Information, Compulsory School-Entry Vaccination Laws and Exemptions: Who Is Opting Out in Ontario and Why Does It Matter, 2010 May, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2875891/>

⁶ Centers for Disease Control and Prevention, State School Immunization Requirements and Vaccine Exemption Laws, Updated February 2017, available at <https://www.cdc.gov/phlp/docs/school-vaccinations.pdf>

⁷ Domestic Public Health Achievements Team, CDC, Ten Great Public Health Achievements --- United States, 2001--2010, May 20, 2011, available at <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6019a5.htm>

⁸ *Berg v Glen Cove City School District*, app. no. CV 93-5053, United States District Court, E.D. New York; *Sherr v Northport-east Northport U. Free Sch. D.* app. nos. CV 87-3116, CV 87-3197, United States District Court, E.D. New York

⁹ *X and Y v the Netherlands*, (Chamber), app. no. 8978/80, §22, *Pretty v UK*, app. no. 2346/02, §61

¹⁰ *Y.F. v Turkey*, app. no. 24209/94, §33, *Acmanne and Others v Belgium*, (dec.), app. no. 10435/83, *Peters v The Netherlands*, (dec.), app. no. 21132/93

¹¹ *Salveti v Italy*, (dec.), app. no. 42197/98, *Solomakhin v Ukraine*, app. no. 24429/03, §33, *Boffa and 13 others v San Marino*, (dec.), app. no. 26536/95

¹² *Bensaid v the United Kingdom*, app. no. 44599/98, §47, *R.R. v Poland*, app. no. 27617/04, §180

¹³ *Pretty v UK*, app. no. 2346/02, §58

¹⁴ *Jehovah's Witnesses of Moscow and Others v Russia*, app. no. 302/02, §136

6 (2) of the Oviedo Convention on Human Rights and Biomedicine, by stating that informed consent is required for any medical intervention under. As applied by the Court, “informed consent”¹⁵ encompasses the notion that patients should be informed of all risks, benefits and alternatives to treatment in order to make a free and informed decision in their best interest. Consequently, compulsory vaccination constitutes an interference with the right to private life, when it is carried out without the “informed consent” of the individual or his/her representative, in the case of minors.

Interference with family life and parental rights of Article 8 of ECHR

As Art. 8 proclaims, everyone enjoys the right to respect for their family life, without any arbitrary interference by the public authorities.¹⁶ The right to family life contains a broad range of parental rights with regard to the care, custody and upbringing of minor children.¹⁷ If a State mandates vaccination as compulsory, parents are deprived of the right to make a decision on the bodily integrity and health of their children. Thus, their right to family life is indisputably restricted.

Besides, States have an international obligation under Article 5 of the Convention of the Rights of the Child (CRC) to respect the right of parents to give directions and guidance to their child. It should be noted that the CRC has become the touchstone for the development of European children’s rights law, and that the ECtHR has accepted that Article 8 must be interpreted in the light of the CRC.¹⁸

Interference with the right to health

Even though it is universally acknowledged that everybody is granted the right to health,¹⁹ such a right is not expressly enshrined in the ECHR. However, this right is safeguarded by a plethora of international human rights instruments, such as the Eu-

ropean Social Charter (Article 11), a treaty enjoying a majority consensus among European countries.²⁰ As the ICESCR Committee has stated, the right to health is not to be understood simply as the right of an individual to be healthy, but rather as the right to control one’s health and body, as well as the right to be free from any interference, such as non-consensual medical treatment.²¹

Interference with the right to freedom of thought, conscience and religion of Article 9 of ECHR

As enshrined in Art. 9 of the ECHR, freedom of thought, conscience and religion is one of the foundations of a democratic society within the meaning of the Convention. This freedom is one of the most vital elements of an individual’s identity, as directly relevant to their perception of life.²² It entails, inter alia, the freedom to hold or not to hold religious beliefs, and to practice or not to practice a religion.²³ While religious freedom is primarily a matter of an individual’s conscience, it also implies the freedom to manifest one’s religion, alone and in private or in community with others, in public and within the circle of those whose faith one shares. According to Article 9 manifesting one’s religion can take various forms, namely worship, teaching, practice and observance.²⁴ Therefore, if one’s religion prohibits medical intervention to the body, the refusal of vaccination can be considered manifestation of their religion.

Usually, individuals who refuse vaccination on religious grounds belong to religious minorities

²⁰ Information document prepared by the secretariat of the ESC “The Right to Health and the European Social Charter” (March 2009), available at <https://www.coe.int/en/web/turin-european-social-charter>

²¹ General Comment 14 of ICESCR, Adopted 11 August 2000, available at <http://www.refworld.org/pdfid/4538838d0.pdf>

²² *Otto-Preminger-Institut v Austria*, (Chamber), app. no. 13470/87, §47

²³ *Kokkinakis v Greece*, (Chamber), app. no. 14307/88, §31, *Buscarini and Others v San Marino*, (Grand Chamber), app. no. 24645/94, §34, *Leyla Şahin v Turkey*, (Grand Chamber), app. no. 44774/98, §104

²⁴ *Leyla Şahin v Turkey*, (Grand Chamber), app. no. 44774/98, §105, *Cha’are Shalom Ve Tsedek v France*, (Grand Chamber), app. no. 27417/95, §73

¹⁵ *R.R. v Poland*, app. no. 27617/04, §174

¹⁶ *El-Masri v the Former Yugoslav Republic of Macedonia*, (Grand Chamber), app. no. 39630/09, §248, *Kroon and Others v the Netherlands*, (Chamber), app. no. 18535/91, §31

¹⁷ *Nielsen v Denmark*, app. no. 10929/84, §61; *Seven Individuals v Sweden*, (dec.), app. no. 8811/79

¹⁸ *Harroudj v France*, app. no. 43631/09, §42

¹⁹ UDHR Art. 25§1

whose rights cannot be ignored within a democratic society, for which pluralism, tolerance and broadmindedness are fundamental.²⁵ Democracy does not mean that the views of the majority must always prevail, but on the contrary that a balance must be achieved between opposing interests within the society must be achieved to ensure the fair treatment of minorities and avoid any abuse of dominant position.²⁶ Thus, States should take into account religious minorities which are opposed to vaccination to ensure that all religious beliefs are respected.

Prohibition of discrimination of Article 14 of ECHR

Article 14 of the ECHR stipulates that the enjoyment of human rights should be secured without discrimination on any ground.²⁷ Thus, Article 14 has no independent existence; it has effect solely in relation to the enjoyment of the rights and freedoms safeguarded by other substantive provisions of the Convention.²⁸

The Court has distinguished two forms of discrimination, the direct, when the difference in treatment between people in similar positions is apparent and the indirect. In the latter form, a general and neutral measure affects disproportionately and adversely a particular group of people defined by a "protected ground" such as those mentioned in Article 14.²⁹ Thus, Article 14 is also violated when States fail to treat differently persons whose situations are significantly different. In *DH and others v. Czech Republic*, the ECtHR recognised that dis-

crimination may arise not only from direct actions of the State, but also from a de facto situation. In other words, a State which enacts legislation mandating that citizens must be inoculated without including religious exemptions for minorities, fails to provide appropriate exceptions to a general rule,³⁰ and thus, indirectly discriminates against them on religious grounds against the exercise of their right to respect for private and family life, and the right to freedom of religion.

Interference justified or not under §2 of Articles 8 and 9 of ECHR

According to Articles 8§2 and 9§2 ECHR, an interference with the right to private and family life and with the right to freedom of religion amounts to a violation, unless it is "in accordance with the law", in pursuit of a "legitimate aim" and "necessary in a democratic society". The rights safeguarded by the Convention would be rendered significantly empty, if a State was free to subject its citizens to compulsory medical treatment without being able to justify itself under Articles 8 and 9 §2 of the Convention.

Regarding the first requirement, the Convention refers to the legal system of the State involved, which must provide an adequate basis for the restrictive measures. Already in its early case law,³¹ the Court identified four questions, which provide a test for deciding if any given interference with a specific right or rights can be deemed legal (the rule of law test). First of all, the domestic legal system must sanction the infraction. Secondly, the relevant legal provision must be accessible to all citizens. In addition, it must be sufficiently precise to enable the citizen reasonably to foresee the consequences which a given action may entail. Finally, the law must provide adequate safeguards against arbitrary interference with the respective substantive rights

The Strasbourg Court does not simply accept as a fact the position of the Respondent State to the effect that a given restrictive measure was based on domestic law.³² On the contrary, the law is test-

²⁵ *S.A.S. v France*, (Grand Chamber), app. no. 43835/11, §128, *mutatis mutandis*, *Young, James and Webster v the United Kingdom*, app. nos. 7601/76, 7806/77, §63, *Chassagnou and Others v France*, (Grand Chamber), app. nos. 25088/94, 28331/95, 28443/95, §112

²⁶ *ibid*

²⁷ Universal Declaration of Human Rights, Art. 7; United Nations Covenant on Economic, Social and Cultural Rights, Art. 2; International Covenant on Civil and Political Rights, Art. 2

²⁸ *Palau Martinez v France*, app. no. 64927/01, §29, *Van Raalte v the Netherlands*, (Chamber), app. no. 20060/92, §33, *Camp and Bourimi v the Netherlands*, app. no. 28369/95, §34

²⁹ *D.H. and Others v The Czech Republic*, app. no. 57325/00, §175, *Orsus and Others v Croatia*, app. no. 15766/03, §150

³⁰ *Thlimmenos v Greece*, (Grand Chamber), app. no. 34369/97, §48

³¹ *Sunday Times vs UK*, app. no. 6538/74, *Huvig v France*, app. no. 11105/84, *Kruslin v France*, app. no. 11801/85

³² *P. van Dijk, G.J.J van Hoof*, Theory and Practice

ed to ensure its conformity with the Convention.

If the interference passes the rule-of-law test, the State must be able to prove that it pursues a legitimate aim, among those listed as grounds for restriction in the second paragraph of Articles 8 and 9 of the ECHR. Often, the legitimate aim behind compulsory vaccination legislation is the protection of public health.³³ However, a State's Government has the responsibility to articulate the public health purpose as clearly as possible: "*the risk to the public must be probable and not merely speculative or remote*".³⁴

Finally, it must be decided whether, with a view to the interest to be protected, the interference may be considered "necessary in a democratic society", according to the test set in *Handyside v UK* and *Sunday Times v UK*. Specifically, it must be decided whether the "interference" complained of corresponded to a "pressing social need," whether it was "proportionate to the legitimate aim pursued," and whether the reasons given by the national authorities to justify it are "relevant and sufficient."

Two principles are involved in this test; the principle of proportionality and the margin of appreciation. Under the first principle, the ECtHR examines whether the means chosen by a State to achieve one of the aforementioned legitimate aims are effective or suitable, necessary in a democratic society and proportionate *stricto sensu*.³⁵ Thus, if an interference with a right proves to be "unsuitable" or "superfluous," either because the aims pursued cannot be achieved by it in any case, or because less

intrusive means were available, there is no good reason to sustain such an interference.³⁶

Compulsory vaccination is not deemed as absolutely necessary, since it constitutes too restrictive a measure, when other less intrusive alternatives could have been introduced. For instance, the State can opt for a voluntary vaccination program, based on recommendations, according to the survey conducted by VENICE, which has been analysed above under the Comparative Law section. Furthermore, introducing religious exemptions to a mandatory vaccination programme is an equally effective measure for the achievement of the protection of public health. This is feasible due "herd immunity";³⁷ a medical term used to describe the effect which occurs when a sufficient proportion of a community is immunised against a contagious disease, and thus, the virus can no longer be transmitted among the population, because there are not many people who can be infected. Hence, the disease cannot gain foothold in that society, because the vaccination coverage is high. Since religious minorities constitute a small number of people, the sufficient proportion of herd immunity can be sustained, if they are granted the right to refuse vaccination.

Finally, it must be noted that proportionality *stricto sensu*, as the third requirement of the proportionality test, requires that a reasonable balance should be achieved between the interests served by the measure and the interests that are harmed by it.³⁸ Therefore, in the case of vaccination, a reasonable balance should be achieved between the legitimate interest of the protection of public health and the rights to private, family life, freedom of religion and the right not to be discriminated under the ECHR.

To a certain extent, the Court has solved these balancing problems by applying its margin-of-appreciation doctrine. This doctrine refers to the "*space for manoeuvre that the Strasbourg organs are willing to grant national authorities in fulfilling their obligations under the European Convention on Human Rights*".³⁹ The Court appears to leave quite a

of the European Convention on Human Rights, Kluwer Law and Taxation Publishers, 1990, pg. 579

³³ *Solomakhin v Ukraine*, app. no. 24429/03, §32, 35, *Boffa and 13 others v San Marino*, (dec.), app. no. 26536/95, pg. 34

³⁴ *Lawrence Gostin & Jonathan M. Mann*, *Toward the Development of a Human Rights Impact*

Assessment for the Formulation and Evaluation of Public Health Policies, in *Health and Human*

Rights: A Reader, Jonathan M. Mann, Sofia Gruskin, Michael A Grodin & George

J. Annas, eds., Routledge, Taylor and Francis Group, New York, London, 1999, pg. 54-72

³⁵ *Janneke Gerards*, *How to improve the necessity test of the European Court of Human Rights*, Published 17 June 2013, *International Journal of Constitutional Law*, Volume 11, Issue 2, 1 April 2013, Pages 466-490

³⁶ *ibid*

³⁷ Herd Immunity, Vaccine Knowledge Project, Oxford Vaccine Group, last updated April 2016, available at <http://vk.ovg.ox.ac.uk/herd-immunity>

³⁸ *ibid*

³⁹ S. Greer, *The Margin of Appreciation*:

broad margin of appreciation to national authorities, when the cases concern sensitive moral or ethical issues.⁴⁰ By contrast, the Court leaves a narrow margin of appreciation to States that must provide serious and compelling reasons for an interference with the choices that people may make in pursuance of the religious standard of behaviour within the sphere of their personal autonomy.⁴¹ In cases of strict review, the Court should be more critical, demanding from the states a reasonable explanation of the choice that it has made between different alternatives.⁴²

Interpretation and Discretion under the European Convention on Human Rights, Council of Europe, 2000, pg. 5

⁴⁰ Parrillo v Italy, (Grand Chamber), app. no. 46470/11, §169

⁴¹ Jehovah's Witnesses of Moscow v Russia, app. no. 302/02, §119

⁴² Janneke Gerards, How to improve the necessity test of the European Court of Human Rights, Published 17 June 2013, International Journal of Constitutional Law, Volume 11, Issue 2, 1 April 2013, pgs. 466-490

Conclusion

Even though compulsory vaccination interferes with a series of human rights safeguarded by the Convention (as proven above), it is difficult to establish a violation of these rights mainly due to the proportionality principle and the doctrine of margin of appreciation. However, it would be paradoxical if the level of protection of the rights and freedoms of religious minorities were to be lowered. It is the State's responsibility to ensure and guarantee the exercise of those rights, and not to discriminate against these minorities. Besides, as the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities proclaims "*States shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law*".⁴³

Ευχαριστώ πολύ την Αγγελική Τσάντα για την πολύτιμη βοήθειά της.

⁴³ Art. 4, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities